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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929

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No. [redacted], Original

THE STATE OF CONNECTICUT, COMPLAINANT

v.

THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT

IN EQUITY

MOTION FOR LEAVE TO FILE — MOTION TO STRIKE OUT CERTAIN PARTS OF DEFENDANT'S ANSWER.

BENJAMIN W. ALLING,
Attorney General of the State of Connecticut and Solicitor and Counsel for the Plaintiff.

ERNEST W. AVERILL,
Deputy Attorney General of the State of Connecticut.

BENEDICT M. HOLDEN,
of Counsel.

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

In the
Supreme Court of the United States

No. 13, Original

THE STATE OF CONNECTICUT, COMPLAINANT

v.

THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT

NOTICE

To the Commonwealth of Massachusetts, defendant herein, and to the Honorable Joseph W. Warner, Attorney General of said State and solicitor of the defendant:

You will please take notice that at the incoming of the Supreme Court of the United States, at 12:00 o'clock M., at the Capitol Building in the City of Washington, District of Columbia, upon Monday, November 4, 1929, or as soon thereafter as solicitors can be heard, the above named complainant will appear by its solicitors and present to said court the motion of said complainant to strike out certain parts of defendant's answer to the bill of complaint, and ask leave of Court to file the same; and further request that leave be granted to argue said motion orally and that a time be fixed for such purpose, a copy of which motion to strike out is presented herewith; when and where you may be present if you so desire.

BENJ. W. ALLING,
Attorney-General,
STATE OF CONNECTICUT,
By ERNEST L. AVERILL,
Deputy Attorney General.

STATE OF MASSACHUSETTS

COUNTY OF

Service of the above motion, by the delivery to me of a copy thereof, with a copy of the aforesaid motion to strike out, is hereby acknowledged this day of 1929.

.....

Attorney General of Massachusetts

In the
Supreme Court of the United States

OCTOBER TERM, 1929

Original No.

IN EQUITY

THE STATE OF CONNECTICUT, COMPLAINANT

v.

THE COMMONWEALTH OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE MOTION TO STRIKE OUT CERTAIN PARTS OF DEFENDANT'S ANSWER.

The State of Connecticut, by its attorney-general, appearing in that behalf by and with the authority, consent and direction of the governor of said state, comes now here and presents this its motion for leave to file in this court a motion to strike out certain parts of defendant's answer, and further requests that said motion to strike out be argued orally and a

time fixed for such purpose. A true copy of said motion is hereto attached.

STATE OF CONNECTICUT,
By BENJAMIN W. ALLING,
Its Attorney-General.

ERNEST L. AVERILL,
Deputy Attorney-General.

BENEDICT M. HOLDEN,
of Counsel.

In the
Supreme Court of the United States

No. 13 Original

THE STATE OF CONNECTICUT, COMPLAINANT

v.

THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT

MOTION TO STRIKE OUT CERTAIN PARTS OF DEFENDANT'S ANSWER.

Now comes the State of Connecticut by Benjamin W. Alling, its Attorney-General, and moves to strike out the following designated portions of defendant's answer for the reasons herein stated:

1. Paragraph 13, page 11, beginning with the words " and further " in the sixth line and ending with the words " of Massachusetts " in the eleventh line as follows:

> " and further answering, says that no property or person situated or living in or having interest in the Connecticut Valley, so-called, is in any way injuriously affected by any acts and things done, contemplated to be done, or threatened to be done, by the Commonwealth of Massachusetts."

Paragraph 17, page 19, beginning with the words " that in " in the twenty-fourth line and ending with the words " said diversion " in the twenty-eighth line as follows:

> " that in nowise will the State of Connecticut or the inhabitants thereof be injured or damaged, or will their

health or safety be imperilled, or will any discomfort be caused to the inhabitants of the State of Connecticut by reason of the said diversion."

Paragraph "Third", page 29, beginning with the words "and in consideration" in the 19th line and ending with the words "any damage" in the 22d line as follows:

> "and in consideration of the fact that the State of Connecticut and the inhabitants thereof will suffer no material damage by reason of the said diversion, if indeed they suffer any damage,"

For the reason that said allegations are wholly immaterial, inasmuch as the State of Connecticut and its inhabitants have the right as riparian owners to the flow of the Connecticut River within the State of Connecticut without diminution as to quantity or alteration as to quality; and any impairment of said right by the Commonwealth of Massachusetts constitutes an injury against which the protection of this Court may be invoked, and by the laws of both States present damage need not be alleged nor proven to entitle a property owner to an injunction to restrain the taking of property.

2. Paragraph 7, page 9, beginning with the words "and that" in the 7th line and ending with the words "is authorized" in the 9th line as follows:

> "and that even from this area only the diversion of certain flood waters as defined in the said legislation is authorized."

Paragraph 14, page 11, beginning with the words "but on" in the 23d line and ending with the words "said waters" in the 27th line as follows:

> "but on the contrary the defendant says that said flood waters are in nowise of benefit to said watershed but cause great and immeasurable damage to the lands, which are at times covered by said waters."

Paragraph 14, pages 11 and 12, beginning with the word "but" in the 35th line on page 11 and ending with the words "and damaged" in the 7th line on page 12 as follows:

> "but on the contrary the defendant alleges that all acts done or contemplated to be done by the Commonwealth of Massachusetts will benefit the State of Connecticut in that they will afford a means by which the damages from excessive and unsual floods may be in part controlled and reduced by withholding the said flood waters from an area which otherwise would be covered with water and damaged."

Paragraph 16, page 15, beginning with the words "and further" in the 19th line and ending with the words "citizens thereof" in the 23d line as follows:

> "And further answering, the defendant says that all acts referred to in the bill of complaint done or contemplated to be done by the Commonwealth of Massachusetts will, as herein set forth both above and hereafter, benefit the State of Connecticut and the citizens thereof,"

Paragraph 17, page 19, beginning with the words "and the defendant further" in the 28th line and ending with the words "of Massachusetts" in the 35th line as follows:

> "And the defendant further avers that by the storage of water contemplated the Commonwealth of Massachusetts will reduce somewhat the intensity and severity of certain seasonal floods which take place in the Connecticut Valley and watershed to the great damage of the inhabitants thereof, both within the State of Connecticut and within the Commonwealth of Massachusetts;"

For the reason that said allegations are immaterial, irrelevant, and impertinent to the issue; and, also, because they are highly improper in seeking to impose the judgment of the Com-

monwealth of Massachusetts on the State of Connecticut, through the contemplated control of flood waters of the Connecticut River by the Commonwealth of Massachusetts; which question of benefit is wholly political and must rest entirely with the judgment of the State of Connecticut, and is not subject to judicial review.

> " And for the further reason that flood waters are a part of the natural flow of a stream to which the riparian owners are entitled.

3. Paragraph 17, pages 16 and 17, beginning with the words "And further " in the 13th line of page 16 and ending with the words " Metropolitan area " in line 34 of page 17 as follows:

> "And further answering, the defendant says that within the city of Boston in said Commonwealth and within the area immediately about said city there is a rapidly growing population, now containing approximately 1,900,000 persons; that for a long period of time it has been apparent that the present supply of water for drinking and domestic purposes is inadequate and if not supplemented by further supplies of pure water for drinking and domestic purposes the persons residing in the Metropolitan district about the city of Boston and within said city will be unable to continue a normal growth in that region and will be subjected to discomfort, inconvenience, and grave risk and danger from sickness and epidemic; that the taking of certain of the waters of the Ware River and of the Swift River has for more than thirty years been definitely contemplated by the Commonwealth of Massachusetts for the purpose of supplying the Metropolitan area about Boston with water for drinking and other domestic uses; that a study of the water requirements of the city of Boston has gone on for over a century, and that experts in water and sanitary engineering have made frequent and well-considered reports of the situation and problem in this respect; that the overwhelming majority opinion of qualified persons who have studied the situation has determined that no other satisfactory and adequate

source of a supply of water exists for said city of Boston and the Metropolitan area about said city unless it includes the waters of the Ware and the Swift rivers, and that no other supply can possibly meet the reasonable demands and needs of the said area and of its rapidly increasing population; that the population whose needs require the proposed diversions from the Ware and Swift rivers is not only that of the metropolitan area within ten miles of the State House, but also that of several other centers whose future requirements must be met directly from metropolitan sources or from sources close to the metropolitan area which would otherwise be available to the metropolitan district itself, that the total population supplied by the district or whose water supply needs are thus intimately connected with those of the district, is over two and one-half million and rapidly growing, comprising nearly 1,900,000 in the metropolitan area itself, 300,000 in the Merrimac Valley group which have long been demanding water from the Wachusett Reservoir, 275,000 in metropolitan Worcester whose needs are met by areas allotted from the Wachusett drainage area, and 100,000 in Essex County, whose need of the Ipwsich River prevents its use by the metropolitan district; that in accordance with the reports of competent authorities the Great and General Court of Massachusetts, by its enactment of Acts of 1926, chapter 375, and Acts of 1927, chapter 321, above referred to and annexed to this answer, has provided for taking the flood waters of the Ware River, as described in said acts, and certain of the waters of the Swift River, as a source of supply of water for domestic purposes for the city of Boston and other communities in and adjoining the Metropolitan area."

Paragraph 17, pages 18 and 19, beginning with the words "that in" in the 36th line on page 18 and ending with the word "Prescott" in the 8th line on page 19 as follows:

> "that in the judgment of the Great and General Court of said Commonwealth the emergency is so great and the prospect of a failure of a domestic water supply for

the Metropolitan district is so imminent as to lead it to provide in said legislation, in order to make possible the location and construction of said reservoir, for the elimination and termination of three historic towns of said Commonwealth, to wit, Enfield, Greenwich, and Prescott;"

Paragraph 20, page 23, beginning with the word "that" in the 16th line and ending with the words "drinking purposes" in the 28th line as follows:

"that it is proposing to proceed with such work because of the pressing emergency confronting the Commonwealth with respect to providing a suitable, necessary, and adequate supply of water for drinking and domestic purposes for the city of Boston and for the metropolitan district about said city; that unless a supply is furnished within a very short period the inhabitants of the said area in and about the city of Boston will be subjected to grave and serious dangers of epidemic and disease, and that the inhabitants of the said area will have insufficient water to meet their necessary and reasonable requirements for drinking purposes;"

Paragraph "First," pages 27 and 28, beginning with the word "First" in the 33d line on page 27 and ending with the words "Ware River" in the 12th line on page 28 as follows:

"First. That a grave and serious emergency exists, as has been above set forth, within said Commonwealth of Massachusetts in that unless a suitable supply of drinking water and of water for domestic purposes is obtained by the City of Boston and the metropolitan area about said city, the inhabitants of the said area must of necessity be unable to continue their normal growth and life with reasonable safety and comfort within said area, and will be subjected to great risks and menace from disease and epidemic, because of the lack of a suitable supply of pure and unpolluted drinking water which can be obtained from no source within the Commonwealth except from the watershed of the Con-

necticut River as has been authorized in said legislation with respect to certain waters of the Swift River and the flood waters of the Ware River."

Paragraph "Third", page 29, beginning with the word "Third" in the 14th line and ending with the word "permitted" in the 19th line as follows:

> "Third. That by reason of the great emergency existing in the Commonwealth of Massachusetts as above set forth, because of the great and immeasurable suffering which would be caused to the citizens of the Commonwealth of Massachusetts if the said diversion be not permitted,"

For the reason that said allegations of emergency and necessity are immaterial, irrelevant and impertinent and are presented merely in justification and excuse of the acts complained of, the performance of which acts by the defendant would be contrary to the law of both the Commonwealth of Massachusetts and the State of Connecticut as to the rights of riparian owners; that the present controversy must be disposed of and adjudicated solely in the light of said law and not in consideration of any questions of emergency and necessity as urged by the defendant; that the said allegations ignore the possibility of a like emergency arising in the State of Connecticut because of its limited water supply and ever increasing population; and that said allegations are inaccurate and uncertain in claiming that the Swift River and the Ware River are the only available sources of potable water which may be used by the City of Boston and the Metropolitan Area, so designated.

Also for the reason that said allegations of emergency and necessity can only authorize the taking of private property and property rights for public use thru the exercise of the Sovereign power of eminent domain by a Sovereign having jurisdiction to take said property and cannot be used as a substitute for the power of eminent domain.

Also for the reason that to permit the taking of the property and property rights of the State of Connecticut and of its citizens upon the grounds of an existing necessity and emergency without the right of the Commonwealth of Massachusetts to exercise the Soverign Power of eminent domain over property and property rights of the State of Connecticut and its citizens would deprive them of their property and property rights without due process of law in violation of the 5th and 14th amendments to the Constitution of the United States.

4. Paragraph 18, page 21, beginning with the words "but on" in the 10th line and ending with the word "Connecticut" in the 35th line as follows:

> "but on the contrary the defendant avers and alleges that the State of Connecticut was fully and completely aware of the plans of the Commonwealth of Massachusetts; that the State of Connecticut was officially represented at hearings before legislative committees of the Great and General Court of the Commonwealth of Massachusetts when the acts authorizing the carrying out of the plans complained of were being considered; that the plans now adopted by the Commonwealth of Massachusetts are the result of a comprehensive study of the water supply problem of the metropolitan district of Boston and that the said study of the problem has been going on for more than a century without in any manner being kept secret; that the recommendations and reports of engineers, water and health experts and other technical students of the situation have been printed and circulated as public documents and have with practical unanimity favored the use of the waters of the Swift River and the Ware River for the purpose of said water supply, and that such waters constitute the only suitable and adequate supply available for the reasonable needs of the metropolitan district of Boston for water for domestic purposes, and that said reports of experts studying the problem have been made public and have been available to officials of the State of Connecticut."

Paragraph "First," Page 28, beginning with the words "that the" in the 19th line and ending with the words "finally enacted" in the 33rd line as follows:

> "that the State of Connecticut has well known for a long time that such reasonable diversion of the waters of the Swift and of the Ware rivers has been contemplated by the Commonwealth of Massachusetts and has failed to make reasonable representations of any damage to said State or to its inhabitants, permitting the Commonwealth of Massachusetts to proceed with its studies, investigations, and plans and to expend large sums for the furtherance of said plans, relying upon the fact that the State of Connecticut, having due notice of the said plans, made no substantial opposition to the legislation pending before the Great and General Court of the Commonwealth of Massachusetts in the form in which the said legislation was finally enacted."

Paragraph "Seventh," page 31, all of said paragraph as follows:

> "Seventh. That the State of Connecticut has well known for a long time of the plans of the Commonwealth of Massachusetts with respect to the said diversion hereinbefore described, and, after the said plans had progressed materially, brought this bill in equity to enjoin the action of the said Commonwealth, causing great expense and delay to the said Commonwealth."
>
> Wherefore, the defendant prays that it may be compensated for the said expense and delay caused by the complainant, and that it may be allowed its costs of defending this bill of complaint, thus improvidently and unnecessarily brought by the said State of Connecticut."

For the reason that said allegations of defendant that plaintiff had known or should have known of defendant's proposals to divert and store certain waters of the Swift and Ware River, and had made no protest or objection to the making by the Com-

monwealth of Massachusetts of plans, preliminary investigations and studies, contemplating the final execution of said proposals, do not constitute a sufficient defense; inasmuch as no duty was imposed on the State of Connecticut to enter any protest or objection until such time as the Commonwealth of Massachusetts undertook to execute said plans to the injury of the State of Connecticut and of its inhabitants, and then only in the regular course of a judicial proceeding before this Honorable Court, which has been done by filing the bill of complaint to enjoin the Commonwealth of Massachusetts from the performance of said proposals; and the plaintiff says further that any protest or objection by the State of Connecticut to the Commonwealth of Massachusetts, other than in the regular course of a judicial proceeding in this Honorable Court, duly taken, would have been highly improper as an interference with the sovereign powers of the Commonwealth of Massachusetts; and the plaintiff avers that the defense of laches cannot be interposed by the defendant against the State of Connecticut as a sovereign State and said defense, if it is a defense, does not apply.

5. Paragraph "First," page 28, beginning with the words "That the" in the 12th line and ending with the words "Ware Rivers" in the 15th line as follows:

> "That the said Commonwealth has expended large sums in preparation for diverting and storing certain reasonable amounts of the waters of the said Swift and Ware rivers,"

For the reason that said allegation of expense is immaterial, irrelevant, and impertinent.

6. Paragraph 16, page 15, beginning with the words "And further" in the tenth line and ending with the words "citizens thereof" in the fourteenth line as follows:

"And further, the defendant affirms that there is an adequate remedy at law for acts or injuries, if any such there may be, incidentally caused to the State of Connecticut or to the citizens thereof;"

Paragraph 21, pages 24 and 25, beginning with the words "and the" in the twenty-fifth line on page 24 and ending with the words "inhabitants thereof" in the fourteenth line on page 25 as follows:

"And the defendant further alleges that by virtue of the provisions of the acts of the Great and General Court of the Commonwealth of Massachusetts, hereinbefore referred to, authorizing the said diversions, due and adequate provision is made for the payment of compensation, not only to citizens of the Commonwealth of Massachusetts but also to citizens of the State of Connecticut, who may suffer any damage by reason of the said diversion, whether such damage be suffered within the Commonwealth of Massachusetts or within the State of Connecticut; and the defendant further alleges that by the common law of the Commonwealth of Massachusetts, as set forth in the leading case of Manville Co. v. City of Worcester, reported in the 138th Massachusetts Reports, at page 89, a remedy is given not only to citizens of the Commonwealth of Massachusetts but to citizens of the State of Connecticut for damages suffered within their borders by virtue of any diversion authorized by the said Commonwealth. And the defendant says that the said remedies in the courts of the Commonwealth of Massachusetts at common law and by virtue of the acts of the Great and General Court, above referred to, constitute a full, sufficient and adequate remedy at law which may be prosecuted by the State of Connecticut or any inhabitants thereof."

Paragraph "Second" on pages 28 and 29, all of said paragraph as follows:

"Second. That both the State of Connecticut and its inhabitants have an adequate remedy at law for any

> damage caused to it or to them by reason of the proposed diversion of certain of the waters of the Swift River and of the flood waters of the Ware River; that the inhabitants of the State of Connecticut, both by virtue of the common law of the Commonwealth of Massachusetts and by virtue of the acts authorizing the said diversions, may sue in the courts of the said Commonwealth for compensation for any damage which they may suffer within said State of Connecticut, and that the State of Connecticut itself may recover such damages as it may suffer by reason of the said diversion, either to its sovereign right or to any riparian rights which it may possess, by an action of law before this Honorable Court."

Paragraph "Third" on page 29 beginning with the words "a court" in the 22nd line and ending with the words "by them" in the 31st line as follows:

> "a court of equity should not grant to the complainant in the premises any specific or injunctive relief, since the complainant in its proprietary capacity as a riparian owner has an adequate remedy at law and in its capacity of *parens patriae* needs no such relief on behalf of or because of the situation of all or any of its inhabitants, all of whom are given by the legislation of the Commonwealth of Massachusetts and by the common law prevailing therein a full, adequate, and complete remedy at law for any damage or injury suffered by them."

For the reason the defendant admits in its answer the contemplated appropriation of water of the Swift River and the Ware River and further admits that said appropriation would diminish the flow of the Connecticut River at the point where it enters the State of Connecticut; which acts would constitute an invasion of a right of real property belonging to the State of Connecticut and of its inhabitants for which invasion according to the rules of law and of equity recognized and enforced both in the Commonwealth of Massachusetts and

the State of Connecticut, there is no adequate and sufficient remedy at law; and the plaintiff further says that such taking of water as is contemplated by the Commonwealth of Massachusetts can be accomplished only through the exercise of the right of eminent domain, appertaining to a sovereign power; but said right of eminent domain cannot be enforced against the State of Connecticut and its inhabitants by the Commonwealth of Massachusetts nor can either the State nor its inhabitants be compelled to accept damages against their will.

7. Paragraph 14, page 11, beginning with the words "and further" in the 29th line and ending with the words "of Connecticut" in the 35th line, as follows:

> "And further answering, the defendant says that no act or thing done or contemplated to be done by the Commonwealth of Massachusetts will in any way materially affect the flow of the Connecticut River or have any tendency to affect adversely the fertility of any land within the territorial boundaries of the State of Connecticut."

Paragraph 16, page 14, beginning with the words "and further" in the 14th line and ending with the words "citizens thereof" in the 30th line as follows:

> "And further, the defendant denies that considering the present uses of the Connecticut River and of the valley adjacent thereto, either by inhabitants of the Commonwealth of Massachusetts or municipalities therein or by inhabitants of the State of Connecticut, any interefecence with the flow of the Connecticut River or diminution in the volume of water discharged by it or carried by it, and still less such acts and the execution of such plans as are authorized by the legislation of Massachusetts to provide a domestic supply of water as hereinbefore and hereinafter set forth, will in any way adversely affect the health of the citizens of the State of Connecticut or cause to them any sickness,

suffering or discomfort, or in any way cause or make possible disease and epidemics, or that there will be in any way damage caused to the State of Connecticut or to the citizens thereof."

Paragraph 16, page 15, beginning with the words "and further" in the second line and ending with the words "that point" in the tenth line, as follows:

"and further, the defendant avers that the diversions of some of the waters of the Swift River and of the flood waters of the Ware River planned and contemplated by the defendant and described in its said legislation will in nowise cause an appreciable diminution in the flow of the Connecticut River at the state boundary, or indeed a diminution which it would be possible to determine by usual methods of stream flow measurement at that point."

Paragraph 17, page 18, beginning with the words "and the" in the 31st line and ending with the words "is authorized" in the 36th line, as follows:

"and the defendant avers that it is clearly and graphically shown by the said map how small, minute, and reasonable with respect to the whole waterflow of the Connecticut River watershed are the watersheds from which a partial diversion is authorized;"

Paragraph 17, page 19, beginning with the words "that the" in the 14th line and ending with the words "Swift River" in the 23rd line, as follows:

"that the proposed diversion of certain of the waters of the Swift River and of the flood waters of the Ware River will in nowise materially affect the flow of the Connecticut River, and that it will be impossible to determine by any practicable measurements at the point where the Connecticut River passes the boundary between the State of Connecticut and the Commonwealth of Massachusetts, any diminution in the flow

of said river caused by the proposed diversion and storage of the waters of the Ware River and of the Swift River;"

Paragraph 18, page 22, beginning with the words "and further" in the 11th line and ending with the words "inhabitants thereof" in the 16th line, as follows:

"And further answering, the defendant says that any user of said waters done or contemplated to be done constitutes a reasonable user of said waters by the Commonwealth of Massachusetts in no way inconsistent with any right or interest of the State of Connecticut or of the inhabitants thereof."

Paragraph 20, page 24, beginning with the words "that by" in the 1st line and ending with the words "of Connecticut" in the 7th line, as follows:

"that by the said diversion, as has been alleged and averred above, only the flood waters of the Ware River, as described in said act, and certain of the waters of the Swift River will be diverted, in no way causing any appreciable diminution in the flow of the Connecticut River at the point where the said Connecticut River enters the State of Connecticut."

Paragraph "Eighth," Page 31, beginning with the words "and the" in the 23rd line and ending with the words "inhabitants thereof" in the 33rd line, as follows:

"and the defendant says that it, the said Commonwealth of Massachusetts and the individual citizens thereof now make and will make after the plans now in contemplation by the said Commonwealth are carried into effect, only a reasonable and proper use of the waters of the Connecticut River and its tributaries for any and all the purposes to which the said waters are now put or are planned to be put by the said Commonwealth and its inhabitants, in nowise interfering with any vested or riparian rights of the State of Connecticut or of any inhabitants thereof."

For the reason that the defendant admits in the answer that it proposes not only to divert certain waters of the Swift River and the Ware River and to store and appropriate same, which act of appropriation is against the law of both the Commonwealth of Massachusetts and the State of Connecticut; and, consequently, the allegations that such storing and appropriation will not cause a material diminution in the flow of the Connecticut River are not material.

8. Paragraph 5, pages 5, 6, and 7, beginning with the words "answering the" in the 35th line, page 5, and ending with the word "described" in the 2d line, page 7, as follows:

> "Answering the fifth paragraph, set forth on pages three and four, of the printed bill of complaint, the defendant admits that the United States of America, acting under the authority of the Constitution of the United States, by virtue of various acts of the Congress of the United States, has assumed the care and control of navigable rivers and has placed the greater portion of the duty of exercising such control in the War Department of the United States Government and the office of the Secretary of War; but the defendant denies that any acts and things which have been in fact done or which are in fact planned by the Commonwealth of Massachusetts, complained of in said bill of complaint, constitute in any way an interference with interstate commerce by affecting the navigability of the said Connecticut River, or that, in so far as concerns any rights or interests of the State of Connecticut or of the people thereof, there is any necessity that permission should be obtained from the War Department and the office of the Secretary of War of the United States before any of the acts and things heretofore actually done or hereafter actually contemplated to be done by the Commonwealth of Massachusetts, referred to in said bill of complaint, may be lawfully done by the Commonwealth of Massachusetts, but the defendant says that whether or not such permit is necessary rests solely within the jurisdiction of Congress and of the War Department,

in so far as the powers of Congress have been delegated to that department. The defendant admits that at the time of the preparation of this answer permission from the War Department or from the office of the Secretary of War of the United States had not been obtained to do any acts actually done or contemplated to be done by the Commonwealth of Massachusetts, referred to in the bill of complaint, for which any permit may be by law required, but the defendant avers that it has filed with the Secretary of War applications for permits to make certain diversions of the waters of the Swift River and of the Ware River, which contemplated diversions are hereinafter more fully described."

Paragraph 10, pages 9 and 10, beginning with the words "and further", line 32, page 9 and ending with the words "of complaint" in line 7, page 10, as follows:

"and further answering, the defendant says that by the Constitution of the United States jurisdiction to determine questions affecting navigability of navigable waters is committed to Congress and to such officials as Congress may designate, and that Congress has so designated the officials of the War Department and has delegated the administration of its powers of supervision of navigable streams to said officials and that the determination of Congress or said officials of the War Department is conclusive as to whether or not the navigability of a navigable stream is affected adversely by any act complained of by the bill of complaint."

Paragraph 11, page 10, beginning with the words "and further" in the 14th line and ending with the words "of War" in the 22d line as follows:

"and further answering, the defendant avers that no question of whether any act done or contemplated to be done by the Commonwealth of Massachusetts has an adverse or injurious effect upon the navigability of the Connecticut River is here relevant or material, the determination of such issues having been committed by

the Constitution of the United States to Congress, which has delegated its administrative powers to the War Department and the Secretary of War."

Paragraph 17, page 20, beginning with the words "that the" in the 9th line and ending with the words "Connecticut River" in the 13th line as follows:

"that the said taking of waters will in nowise contravene any Federal law or right, nor, if it be here material, which the defendant denies, will said taking in any way impair or impede the navigability of any portion of the Connecticut River;"

Paragraph "First", page 28, beginning with the words "which diversion" in the 15th line and ending with the words "of Connecticut" in the 19th line as follows:

"which diversion will in no way seriously, appreciably, or unreasonably diminish the normal flow of the said Connecticut River or cause damage to the citizens of Connecticut or to the State of Connecticut;"

Paragraph "Fifth," page 30, beginning with the word "Fifth" in the 4th line and ending with the words "of War" in the 15th line as follows:

"Fifth. That the allegations contained in the bill of complaint in many and divers places, with respect to any interference which may be caused by the said diversion with the navigability of the Connecticut River are in nowise material, relevant, and pertinent to this bill, inasmuch as exclusive control of navigable waters and regulation of obstructions and diminutions of navigable streams has been committed by the Constitution of the United States to the Congress of the United States, which, in turn, has delegated under general rules administrative power over the said waters to the Secretary of War and the Department of War."

For the reason that the said allegations of the defendant that the Government of the United States has the regulation and control of the waters of interstate streams which are navigable and of the tributaries thereto and that applications have been made to the Secretary of War for permits to divert the waters of the Ware and Swift Rivers is immaterial and irrelevant because until such permits have been actually issued the defendant is without authority to make such diversion of water.

Also for the reason that while it is admitted therein that the navigable capacity of the Connecticut River will be obstructed and reduced by a diversion of waters from the Ware and Swift Rivers which waters would otherwise flow into and become the navigable waters of the Connecticut river, there is no allegation that an affirmative act of Congress has been obtained for such obstruction as required by Section 10 of the River and Harbor Act, approved March 3, 1899.

Also for the reason that while it is admitted in the answer of the defendant that dams will be erected in both the Ware and Swift Rivers, there is no allegation therein that the consent of Congress to the construction of such dams has been obtained as required by Section 9 of the River and Harbor Act, approved March 3, 1899.

Also for the reason that there is no allegation therein that plans and specifications therefor have been submitted to and approved by the Chief of Engineers and Secretary of War as required by Section 9 of the River and Harbor Act, approved March 3, 1899.

Also for the reason that the work proposed to be done has not been recommended by the Chief of Engineers nor authorized by the Secretary of War as required by Section 10 of the Rivers and Harbors Act, approved March 3, 1899.

Also for the reason that not only is it necessary to obtain the consent of the Government of the United States to perform any act pertaining to the waters of the United States but the consent of the State of Connecticut must also be obtained before any act can be performed which will adversely affect the navigation or navigable capacity of a navigable stream flowing through the State of Connecticut.

Also for the reason that neither Congress, the Secretary of War nor the Chief of Engineers have any power or authority to authorize the diversion of water from a navigable stream or tributary thereof for a non-navigable purpose; and particularly in the present instance there is no power or authority in either of said agencies of the Government of the United States to authorize the diversion of these waters for the purpose of a domestic water supply in another and entirely different watershed, which waters will be forever removed from navigation.

9. Paragraph 17, pages 19 and 20, beginning with the words "that all" in the 35th line, page 19, and ending with the words "navigable waters" in the 9th line, page 20 as follows:

> "that all the waters so taken or planned to be taken in order to supply the inhabitants of the city of Boston and of the Metropolitan area about said city with a necessary, adequate, and satisfactory supply of water for drinking and domestic purposes fall within the territorial limits of the Commonwealth of Massachusetts and are subject to be taken by the said Commonwealth and by the laws thereof and according to the laws in force throughout the United States of America, subject only to the right of the Federal Government to control and regulate navigable waters;"

Paragraph 17, page 20, beginning with the word "and" in the 19th line and ending with the words "domestic use" in the 24th line as follows:

"And further answering the defendant says that by the laws of the State of Connecticut the diversion of water from the watershed of the Connecticut and other rivers is permitted and authorized for the purpose of providing municipal supplies of water for domestic use;"

Paragraph 17, page 20, beginning with the words "that the" in the 29th line and ending with the words "said stream" in the 34th line as follows:

"that the laws of both said State and Commonwealth permit the diversion of waters, even of interstate streams, for the purpose of providing a water supply for the domestic use of the inhabitants of the community, and permit the diversion of said waters to a watershed beyond the watershed of said stream."

Paragraph 21, page 24, beginning with the words "and further" in the 15th line and ending with the words "of law" in the 25th line as follows:

"And further answering, the defendant says that any diversion of the flood waters of the Ware River and of such waters of the Swift River as the said Commonwealth plans to divert is within the sovereign and riparian rights of said Commonwealth and authorized by the laws of said Commonwealth and by the laws of the United States of America, and that in nowise is the State of Connecticut, as *parens patriae* or in its own right, or are the citizens of the State of Connecticut, deprived of any of their rights or property, either contrary to law or without due process of law."

Paragraph 24, pages 26 and 27, beginning with the words "and the" in the 33d line, page 26, and ending with the words "of Massachusetts" in the 15th line, page 27 as follows:

"And the defendant further avers that the Commonwealth of Massachusetts by its law and consistently with the laws of the State of Connecticut is entitled as a sovereign and as *parens patriae* to make reasonable use of the waters of tributaries of the Connecticut River

or of the Connecticut River itself within the borders of said Commonwealth, so long as it does not in any material and extraordinary way interfere with a reasonable flow within said river. And the defendant says that in no way interferes with the flow of said river or of its tributaries or contemplates any such interference or diversion of waters of the Connecticut River or of its tributaries as will in any way injure the State of Connecticut or its inhabitants or will in any way interfere with any rights which the State of Connecticut has under the Constitution of the United States or by virtue of its sovereign rights or by virtue of the laws of nations or of the laws of the State of Connecticut or of the Commonwealth of Massachusetts."

For the reason that the sovereignty of the Commonwealth of Massachusetts does not include the power to take and divert the waters of an interstate stream nor any of the tributaries thereof.

Also for the reason that the sovereignty of the Commonwealth of Massachusetts does not include the power and authority to take the property or property rights of the State of Connecticut.

Also for the reason that the sovereignty of the Commonwealth of Massachusetts does not include the exercise of the power of eminent domain over property or property rights situated without its boundaries.

Also for the reason that the sovereignty of the Commonwealth of Massachusetts does not include the ownership and control over the waters of an interstate stream, the waters thereof being the common property of all of the owners of riparian lands located within both of the states through which such stream flows.

10. Paragraph 14, pages 12 and 13, beginning with the words " and the " in the 7th line, page 12 and ending with the words " its environs " in the 8th line, page 13 as follows:

> "And the defendant further alleges affirmatively that according to certain plans for the storage, by the Commonwealth of Massachusetts of water in the valley of the Swift River, it will be possible, and it is the intention of Massachusetts to release a sufficient amount of water daily to maintain a reasonable flow in the Swift River and thus contribute to the maintenance of the flow of the Connecticut River itself. And further answering, the defendant says that under the legislation adopted by the Commonwealth of Massachusetts, so much of the waters of the Swift River as may be held back with the permission of the War Department of the United States will be stored by the Commonwealth of Massachusetts in the valley of the Swift River and will be in nowise diverted into any other place until such time as the said waters are actually required for use for drinking and other household purposes by the citizens and inhabitants of the Commonwealth of Massachusetts, at which time the waters will be transferred, as actually needed for such use, to reservoirs directly supplying the region in and about the city of Boston; that only the flood waters of the Ware River, as defined in said legislation, copies of which are hereunto annexed marked Appendix A, will be diverted by the Commonwealth of Massachusetts under the provisions of said legislation, so that no interference with, or diminution of, the flow of said last-named river during the drier seasons of the year will take place, such flood waters actually being in part stored in the Wachusett Reservoir and in part in a reservoir to be constructed in the valley of the Swift to which reservoirs such flood waters of the Ware River actually diverted will be transferred by means of tunnels and conduits, and that such flood waters will be so diverted only for a supply of water for drinking, household, and other domestic and municipal uses of the 1,900,000 human beings living in the city of Boston and its environs."

Paragraph 17, page 20, beginning with the words "that such" in the 13th line and ending with the words "inhabitants thereof" in the 19th line as follows:

> "that such uses for drinking and domestic purposes of the water so to be stored and diverted both in law and in fact constitute a reasonable and proper user of the waters of the Swift and of the Ware rivers, and they are in nowise inconsistent with any rights, interests, privileges, or immunities of the State of Connecticut or of the inhabitants thereof."

Paragraph 17, page 20, beginning with the words "and the" in the 24th line and ending with the words "riparian owners;" in the 28th line as follows:

> "and the defendant avers that the law both of the Commonwealth of Massachusetts and of the State of Connecticut permits the reasonable use of water by riparian owners if such use does not unreasonably injure lower riparian owners;"

Paragraph "Eighth", page 31, beginning with the word "Eighth" in the 13th line and ending with the words "sewage purposes" in the 23d line as follows:

> "Eighth. That by virtue of sovereign rights and by virtue of riparian rights according to the laws both of the State of Connecticut and of the Commonwealth of Massachusetts, the Commonwealth of Massachusetts and individual citizens thereof and persons owning land therein are entitled to make reasonable use of the waters of the Connecticut River and of tributaries thereof, not only for purposes of providing adequate supplies of water for drinking and household purposes, but also to make reasonable use of the said waters for drainage and sewage purposes."

For the reason that a reasonable use of the waters of an interstate stream does not include either by the law of the Commonwealth of Massachusetts or of the State of Connecticut, the right to take any of such waters for use on non-riparian land.

Also for the reason that the taking of the waters of an interstate stream is not a reasonable use thereof.

11. Paragraph 16, pages 14 and 15, beginning with the words "The defendant" in the 30th line, page 14, and ending with the words "people thereof" in the 2d line, page 15, as follows:

> "The defendant avers that the waters of the Connecticut River at the point where the river crosses the boundary between the State of Connecticut and the Commonwealth of Massachusetts could successfully dilute and carry away several times the volume of sewage now contained in the said waters at that point without in any degree or manner causing sickness, suffering, epidemic, or even discomfort to the State of Connecticut or to the people thereof,"

Paragraph 19, pages 22 and 23, beginning with the words "but the" in the 32d line, page 22, and ending with the words "any discomfort" in the 4th line, page 23, as follows:

> "but the defendant avers that said Connecticut River could successfully dilute and carry away several times the volume of sewage contained in said river at the point where it crosses the boundary between the State of Connecticut and the Commonwealth of Massachusetts without in any degree causing a menace or danger to the health of the inhabitants of the State of Connecticut or causing to said inhabitants any discomfort."

Paragraph 22, pages 25 and 26, beginning with the words "and further" in line 34, page 25, and ending with the words "of Connecticut" in line 6, page 26, as follows:

> "And further answering, the defendant avers that the waters of the Connecticut River at the point where said river passes the boundary between the State of Connecticut and the Commonwealth of Massachusetts could successfuly dilute and carry away several times the volume of sewage and other substances now contained in the said waters without in any way causing damage,

injury, or discomfort to the inhabitants of the State of Connecticut."

For the reason that the Commonwealth of Massachusetts and its inhabitants have no right to pollute the waters of an interstate stream.

12. Paragraph 24, page 26, beginning with the words "particularly denying" in the 27th line and ending with the words "said river" in the 33d line. as follows:

> "particularly denying that the State of Connecticut has either by the law of the State of Connecticut or under the laws of the Commonwealth of Massachusetts, either as a sovereign, as *parens patriae*, or as a riparian owner, any vested right to the waters of the Connecticut River or to any portion thereof above and beyond a reasonable flow within said river."

For the reason that the right to the entire flow of an interstate stream undiminished in volume and uncontaminated as to quality is a vested right in each riparian owner along such stream which is an integral part of the ownership of such lands and such rights can only be taken away by the exercise of the sovereign power of eminent domain for public use by a sovereign to whom such owners owe allegiance.

Wherefore, the State of Connecticut moves that such portions of the defendant's answer as are thereinbefore designated be stricken out.

THE STATE OF CONNECTICUT
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